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Supreme Court, U.S.
FILED
MAY 2 1997
CLERK

No. 96-1546

In The Supreme Court of the United States
October Term, 1996

CONTINENTAL TREND RESOURCES, INC., et al.,
Petitioners,
v.

OXY USA INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

REPLY BRIEF

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REPLY BRIEF

Respondent OXY USA Inc.'s ("OXY") Brief in Opposition concedes that the Tenth Circuit Majority Opinion ("Majority Opinion") employed a *de novo* review of the jury verdict relying on evidence outside the record without any deference to the jury verdict or the district court's findings. In their Petition for Certiorari, Petitioners Continental Trend Resources, Inc., *et al.*[1] ("CTR") demonstrated that this extraordinary procedure represented a dramatic departure from established appellate practice and directly conflicts with this Court's decisions in *Gasperini v. Center of Humanities, Inc.*, 116 S.Ct. 2211 (1996) ("*Gasperini*"), *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996) ("*BMW*") and *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) ("*BFI*"). The issue left open in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331 (1994) ("*Oberg*") of "what standard of review is constitutionally required" for appellate review of punitive damage awards challenged on constitutional grounds is ripe for review by this Court.

OXY implicitly acknowledges that *Gasperini* would prohibit the Majority's *de novo* venture. OXY, however, dismisses *Gasperini* as "irrelevant". Instead, OXY urges the Court to accept the proposition that there is a chameleon-like standard of review by federal appellate courts which changes color from abuse of discretion to *de novo* whenever a party incants a claim of constitutional deprivation due to an alleged "grossly excessive" verdict. By this reply, CTR will show

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[1] The other Petitioners are Harold G. Hamm, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; Gary H. Wright, Cindy Wright, Jeffrey B. Hume, and Farrar Oil Company.

that *Gasperini* is not only relevant but controlling. Certiorari should be granted to resolve this issue of critical importance.

I. CERTIORARI SHOULD BE GRANTED TO DECIDE THE ISSUE OF THE PROPER STANDARD OF REVIEW IN A PUNITIVE DAMAGE DIVERSITY CASE

The calculation of the appropriate amount of punitive damages has traditionally been left to the unique discretion of the factfinder. Whether judge or jury, the factfinder is in the best position to determine the amount of a punitive damage award because "the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371, 14 L.Ed. 181 (1851). Historically, in reviewing the constitutionality of an award of punitive damages, a court could not explicitly or implicitly recalculate the award of damages nor express an opinion whether the award was too high or too low. This is because of the time-honored rule that a court may not substitute its judgment for that of the jury. *See Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944); *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978). "'If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.'" *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991) ("*Haslip*") (citations omitted).

Gasperini reaffirmed the notion that in a federal court diversity case, the Seventh Amendment prohibits a court of appeals from redetermining a fact issue decided by a jury and that the review standard for damage awards was abuse of discretion. 116 S.Ct. at 2223-24. *BMW* did not change the

settled federal abuse of discretion standard of review nor create a vehicle for expansive *de novo* appellate review of punitive damage awards. Instead, it created a narrow channel for appellate review in which the focus of the reviewing court is to ensure that "under the circumstances of the case in question, the award of punitive damages is not grossly excessive." 116 S.Ct. at 1595.

OXY attempts to skirt the holding of *Gasperini* by arguing that it is "irrelevant to the question that was before the Tenth Circuit" because this case involves punitive damages, not compensatory damages. (OXY Response, p. 4.) OXY is wrong. The Tenth Circuit recognized the relevance of *Gasperini*. Pet. App. at 19a-20a. More importantly, this Court has held that "the question whether an award of *compensatory* damages exceeds what is permitted by law is not materially different from the question whether an award of *punitive* damages exceeds what is permitted by law." (Emphasis in original.) *Gasperini*, 116 S.Ct. at 2223 n.18; *see also* 116 S.Ct. 2221 n.12. In *Oberg*, the Court found that there was no historical basis for suggesting "that different standards of judicial review were applied for punitive and compensatory damages before the twentieth century." 512 U.S. 415, 423 n.2, 114 S.Ct. 2331, 2336.[2]

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[2] In its Petition, CTR also showed that the Majority Opinion conflicts with other circuit courts which employ an abuse of discretion review standard. OXY's attempt to distinguish those cases is unavailing. (OXY Response, pp. 6-7 n.3.) *See, e.g., Steinke v. Beach Bungee*, 105 F.3d 192 (4th Cir. 1997) [*Gasperini* governs motion for remittitur; court of appeals required to apply abuse of discretion standard of review citing punitive damage case of *Defender Indus. v. Northwestern Mutual Life Ins. Co.*, 938 F.2d 503, 507 (4th Cir. 1991) (*en banc*)]; *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) [applying abuse of discretion (continued...)

A punitive damage award is "grossly excessive" only when, in relation to the state's legitimate interests and punishment and deterrence, it "enter[s] the zone of arbitrariness that violates the due process clause." *BMW*, 116 S.Ct. at 1595. OXY's assertion, that this inquiry is a legal determination because "the jury was never asked to resolve this constitutional question and so there can be no issue of reexamining the jury's factfinding on the Seventh Amendment" (OXY Response, p. 4), is disingenuous. A court cannot determine whether the punitive damage award is "grossly excessive" in relation to the state's legitimate interests and punishment and deterrence unless the court first reviews the factual record upon which the punitive damage verdict was predicated. The touchstone of constitutionality under *BMW* and its predecessors is not the amount of the award in the abstract. Instead, it is a determination of whether the award is "reasonable" by application of the guideposts to a discrete factual record. By necessity, a court can only determine whether an award is grossly excessive by a review of the facts upon which the award was based. If OXY's position is accepted, much of the Court's discussion in *BMW* identifying the type of facts and conduct associated with particularly reprehensible conduct is superfluous. The *BMW* Court specifically rejected a mechanistic legal bright line approach for judicial review. 116 S.Ct. at 1604.

A review of this Court's recent punitive damages decisions show the flaw in the Majority's *de novo* journey

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2 (...continued)
standard where "Wal-Mart contends that the amount of the award 'shocks the conscience' because it is ... so excessive it violates the Fourteenth Amendment" (citing *BMW*)]. *See also Neibel v. Trans World Airline*, 108 F.3d 1123 (9th Cir. 1997).

and why certiorari should be granted. In *BMW*, the Court first observed that the Alabama Supreme Court "properly" eschewed reliance on evidence not in the record, *BMW*, 116 S.Ct. at 1598, and focused on facts in the record accepting "of course, the jury's finding" on those facts. Contrary to OXY's depiction of *BMW*, the Court afforded deference to both the Alabama Supreme Court and the jury's findings and left the "appropriate remedy" to the "state court in the first instance." *Id.* at 1604. Justice Breyer, joined by Justices O'Connor and Souter, wrote separately to emphasize that "[m]embers of this Court have generally thought, however, that if 'fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity'" (citation omitted), and that it was "important to explain why this presumption of validity is overcome in this instance." *See BMW*, 116 S.Ct. at 1604.

In *Oberg*, the Court recognized that "[t]his case does not pose the more difficult question of what standard of review is constitutionally required. Although courts adopting a more deferential approach use different verbal formulations, there may not be much practical difference between review which focuses on 'passion and prejudice', 'gross excessiveness' or whether the verdict was 'against the great weight of the evidence.' All of these may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (whether 'no rational trier of fact could have' reached the same verdict)." 512 U.S. at 432 n.10, 114 S.Ct. at 2341 n.10.

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) ("*TXO*") instructed that "[t]he jury verdict in respondent's favor ... makes it appropriate to accept respondent's version of disputed issues of fact," 509 U.S. at

447, and that "[a]ssuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, (citation omitted), or virtually so, (citation omitted)." 509 U.S. at 457. The Court likewise emphasized the deferential nature of an excessiveness review. *See also BFI, supra.*

The Majority Opinion also contradicts the *Gasperini* and *BFI* mandate that the primary responsibility for an excessiveness review is lodged in the district court in the first instance.[3] *See, e.g., VF Corp. v. Wrexham Aviation Corp.*, 686 A.2d 647 (Md. App. 1996) (because a post-verdict review by trial judge is required to validate punitive damage award, *BMW* guideposts should first be applied by the trial court). The right to jury trial is too precious to permit the standard of review to become a moving target and the responsibilities of the district court or the courts of appeal to be blurred, depending on the type of error asserted. (*See* OXY Response, p. 8.) The application of *de novo* standard of review is not only wrong, it is clearly contradicted by this Court's extant case law. Certiorari should be granted.

An equally serious violation of the Seventh Amendment occurred when the Tenth Circuit relied on evidence outside the record.[4] In its Petition, CTR provided cases and

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[3] OXY wrongly suggests that CTR waived its argument that the Majority erroneously applied *Gasperini*. Unlike OXY, CTR identified the relevancy of *Gasperini* and its application to this case in its Brief on Remand (*see* Brief, pp. 3-5; Pet. App. 19a-20a.)

[4] OXY grossly misrepresents the affidavits in question. The (continued...)

explained why consideration of evidence outside the record by a federal appellate court violates the Seventh Amendment. (*See* Petition, pp. 18-23.) *See also Ford v. Guarantee Abstract & Title Co.*, 553 P.2d 254, 276-77 (Kan. 1976) (court violated the Seventh Amendment by basing remittitur on matters outside of the record). OXY's *ipse dixit* argument, that the jury made no determination regarding potential harm and therefore consideration of the subject affidavits was harmless, is folly. Both the district court and the Tenth Circuit's prior decision found that the jury had ample evidence of potential harm to support the verdict and that such evidence was expressly urged by counsel for CTR as a basis to impose punitive damages. *See, e.g.*, Pet. App. 79a-81a.

OXY also weakly asserts that the Tenth Circuit's error was a "case specific error not appropriate for this Court's consideration" (OXY Response, p. 10), urging that there is no case contrary to the Tenth Circuit's decision. This Court itself, however, has rejected the idea that a reviewing court may rely on matters outside the evidence heard by the jury. In *BFI*, *Haslip*, *TXO* and *BMW*, the Court focused solely on

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[4] (...continued)
affidavits were not mentioned by either party throughout this lengthy process as a basis for either affirming or reversing the jury's verdict. The district court did not consider the affidavits as part of the record in its lengthy opinion denying OXY's motion for new trial and specifically rejected OXY's attempts to inject matters outside the record. (Pet. App. 859.) The Tenth Circuit did not mention, much less consider, the affidavits in first affirming the judgment in its entirety. CTR was never given notice that the Tenth Circuit would consider evidence outside the record nor was CTR given the opportunity to discuss the relevance (or lack thereof) of the affidavits to the jury's findings. At bottom, the affidavits were submitted for a different purpose, on different issues, and had nothing to do with the voluminous evidence that was introduced before the jury of OXY's actual and potential harm and profit.

the evidence presented to the jury in reaching its decision. As Justice Kennedy has explained, "it is commonplace that a jury verdict must be reviewed in relation to the record before it.... [A] jury is bound to consider only the evidence presented to it in arriving at a judgment." *TXO*, 509 U.S. at 468. OXY makes no attempt to distinguish these cases nor the other conflicting authority cited in the Petition. More telling is that OXY has failed to cite a single decision -- state or federal -- which would permit an appellate court to consider matters never presented to the jury in determining an issue of remittitur. CTR previously demonstrated that the Tenth Circuit's *de novo* factfinding journey into and outside the record has had a profound impact on this case and will have an even more profound and undesirable result on other cases. Certiorari should be granted to resolve these important issues.

II. THE MAJORITY APPLIED A MATHEMATICAL CAP OF 10 TO 1 AND VIOLATED THE SEVENTH AMENDMENT BY REFUSING TO REMIT THE VERDICT TO THE MAXIMUM CONSTITUTIONALLY PERMITTED AMOUNT

CTR and OXY simply disagree whether the Majority Opinion held that there was a maximum "10 to 1 ratio in commercially injury cases [where] the damages are significant and the injury not hard to detect." The dissenting judge certainly read the Majority's decision as capping punitive damages in economic injury cases at a 10 to 1 ratio. Pet. App. 24a. OXY, of course, does not dispute the point that such a holding squarely conflicts with this Court's decision in *BMW*, *TXO* and *Haslip*.

In its Petition, CTR also argued that the Majority Opinion violated the Seventh Amendment by refusing to remit the judgment to the maximum constitutional amount. OXY confuses CTR's argument by suggesting that CTR "actually wants to elevate the ratio above all other considerations."[5] (OXY Response, p. 13.) OXY's attempt to deflect CTR's Seventh Amendment argument is unpersuasive.

CTR cited several federal appellate decisions holding that remittitur to the highest amount the jury could have properly awarded is required to comply with the Seventh Amendment.[6] (*See* Petition, pp. 23-25.) These decisions create a direct conflict with the Majority's decision here to remit it to the least amount the jury could have awarded. OXY makes no attempt to distinguish these cases. The Tenth Circuit's holding presents a direct conflict with this Court's prior opinions and the Seventh Amendment of the Constitution. Certiorari should be granted.

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[5] OXY wrongly asserts that *BMW* does not support the conclusion that potential harm to others is a relevant consideration in the constitutional calculus. In its Petition, CTR explained the relevance of the consideration and the impact its exclusion had on this case. *See* Petition, pp. 27-30.

[6] Historically, it was typical practice to grant a remittitur to the maximum amount that a reasonable jury could have awarded. *See Guerry v. Kerton*, 31 S.C.L. (2 Rich.) 507, 512 (S.C. 1846) (granting remittitur to "the highest verdict, according to the evidence, that the jury could have given"); *Diblin v. Murphy*, 3 Sand. 19, 21 (N.Y. Super. Ct. 1849) ("reducing the verdict to an amount, such as if the jury had found it as the damages, we would not interfere with their conclusion...."); *Dimick v. Schiedt*, 293 U.S. 474, 480-81 (1935).

CONCLUSION

For the reasons stated in its Petition and in this Reply, CTR requests the Court to grant certiorari and set this case for plenary review.

Respectfully submitted,

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Dated: May 2, 1997